

Legal Issues
CEPEC & NEPEC
November 3, 2010



NOT legal advice Consult your legal counsel

What are we discussing?

- CEPEC Status
- Potential Liability
- Liability Protections



Status of CEPEC

- Statutes Supporting CEPEC Status:
 - California Government Code § 955.1
 - California Government Code § 8657(c)
 - California Government Code § 11126
- Not created explicitly in statute, but referenced several times in Government Code and granted liability protections



Status of NEPEC

- National Earthquake Hazards Reduction Program
- Earthquake Hazards Reduction Act of 1977, Sec. 5(f)(1)
- Disaster Relief Act of 1974, Sec. 202
- Public Law 96-472, Sec. 101(e)(2)
- Support responsibility under Stafford Act, Public Law 93-288



Liability

- Civil
- Criminal



Criminal Liability – Difficult to Prove

- Manslaughter
 - -Criminal negligence
- Mens rea
- Beyond a reasonable doubt



Will I be sued?



The real question – Will I/we be held liable?

- Prove allegations
- Liability protections



Civil Liability

NEGLIGENCE

- Duty
- -Breach
- -Causation
- Damages
- Burden



Causation Issue

- Recommendations
- Director or Governor may choose to accept or reject recommendation
- Documentation



Liability Protections in California Law

- Sovereign Immunity
- California Tort Claims Act (Cal. Gov. Code 810, et seq.)
 - Immunity waiver
 - § 820.2. Immunity for Discretionary Acts
 - Course and scope of duties
 - Public Employee
 - Discretionary acts "whether or not this discretion was abused"
 - § 822.2. Misrepresentation
 - Course and scope
 - Public Employee
 - Exception: fraud/corruption/malice



Liability Protections in California Law, Continued

- Emergency Services Act (ESA) Cal. Gov. Code § § 8550, et seq.
 - Acts During Training/Emergencies
 - Broad Protections Actions and failure to act
 - § 8655 Discretionary functions
 - § 8657 Volunteers and Conscripted persons
 - Subsection (c) specifically protects CEPEC
 - § 8660 Interstate Arrangements
 - Officers or employees rendering aid pursuant to interstate arrangement or compact; immunity from liability



Liability Protections in California Law, Continued

- Cal. Gov. Code 955.1 Liability Protections for issuance/nonissuance of earthquake or volcanic warning
- Article I, section 19 of the California Constitution Property
- Police Power
 - Reasonably necessary to protect the order, safety, health, morals, and general welfare of society.



Government Code § 8657(C)

"[I]n its review, hearings, deliberations, or other validation procedures, members of the council, jointly and severally, shall have the same degree of responsibility for their actions and enjoy the same immunities as officers and employees of the state and its political subdivisions engaged in similar work in their respective entities. Any person making a presentation to the council as part of the council's validation process, including presentation of a prediction for validation, shall be deemed a member of the council until the council has found the prediction to have or not have scientific validity."



California Government Code § 955.1

"[T]he Governor may, at his or her discretion, issue a
warning as to the existence of an earthquake or
volcanic prediction determined to have scientific
validity. The state and its agencies and employees
shall not be liable for any injury resulting from the
issuance or nonissuance of a warning pursuant to
this subdivision or for any acts or omissions in fact
gathering, evaluation, or other activities leading up
to the issuance or nonissuance of a warning."



Government Code § 8655

 "The state or its <u>political subdivisions</u> shall not be liable for any claim based upon the exercise or performance, or the failure to exercise or perform, a discretionary function or duty on the part of a state or local agency or any employee of the state or its political subdivisions in carrying out the provisions of this chapter."



ESA Protections - Cases

- Farmers Insurance Case
- Soto Case
- General Idea: ESA offers broad protections



Farmers Insurance v. California

- State of Emergency
- Medfly eradication wide-scale aerial insecticide spraying
- Insurance company sues --claims paid for costs of new car paint
- Insurance company loses
- State and its agents immune from liability
- Policy decisions are discretionary, and thus protected
- Eradication a valid exercise of police power
- Necessity Defense: actions to prevent a threatened injury from force of nature
- Policy: to quell an emergency, the state must be able to act with speed and confidence without fear of incurring tort liability
- Liability immunity under ESA can apply even if state violates another statute



Soto v. California

- Student injured during training exercise
- Immunity from liability under ESA
- Providing training exercises for disaster response is state's responsibility. Even if the exercise was negligently designed and performed, state is still protected for discretionary acts.
- Expanded immunity under ESA NOT limited to emergencies



Suit Against Public Employees

- Attorney General
 - -§ 825
 - California Attorney General may defend state employees when they are sued for actions that occurred while acting in the course and scope of their employment



Protecting CEPEC

- Appointment of CEPEC Membership
 - Leave no question that CEPEC is acting on behalf of the government
- Clear Charter
 - Explain scope and duties within government



Federal Liability Protections

- The United States cannot be sued without the unequivocally expressed consent of Congress
- The Federal Tort Claims Act authorizes suits against the US for damages arising from some tortious acts
- The FTCA excepts discretionary functions and duties from this waiver of sovereign immunity



Stafford Act

- Discretionary Function Exception
- 42 U.S.C. § 5148:
 - This is viewed similarly by courts to the discretionary exemption in the FTCA



Questions

